"Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'" 539 U.S. at 56–57, quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co*., 334 U.S. 219, 236, (1948). Citizens Bank and Alafabco, a fabrication and construction company, entered into debt-restructuring agreements that contained an agreement to arbitrate any disputes. The Court rejected the argument that the individual transactions underlying the agreements did not, taken alone, have a "substantial effect on interstate commerce." Id. at 56. First, the Court found that Alafabco engaged in interstate commerce using loans from Citizens Bank that were renegotiated and redocumented in the debt-restructuring agreements. Second, the loans at issue were secured by goods assembled out-of-state. Finally, the Court relied upon the "broad impact of commercial lending on the national economy [and] Congress' power to regulate that activity pursuant to the Commerce Clause." The arbitration agreements between the Respondent and the individual employees in this case do not fall within any of these rationales.

The Charging Party, pointing out that the FAA derives its authority from the Commerce Clause, cites to *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012). *Sebelius* discusses the Commerce Clause in relation to Affordable Healthcare Act's (ACA) provision requiring individuals to buy health insurance, commonly known as the individual mandate. In describing the reach of the Commerce Clause in *Sebelius*, the Court observed, "Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'" The Court determined that the "activity" at issue with regard to the individual mandate was the purchase of healthcare insurance, and that under the Commerce Clause, Congress was not empowered to regulate the failure to engage in this activity. Under this analysis, the "activity" the MAA concerns is resolution of employment disputes. For the reasons described above, this "activity" does not necessarily affect interstate commerce, particularly in cases where no dispute with regard to employment under the MAA ever arises.

Based on the foregoing, I agree with the Charging Party that the Respondent has made no showing that an arbitration agreement between the Respondent and any of its individual employees affects commerce.[19]

4. Team truck drivers

The Charging Party further argues that team truck drivers who transport the Respondent's products across state lines are a class of workers engaged in interstate commerce, and therefore fall within FAA's exception at 9 U.S.C. § 1. The Court in *Circuit City* held that "Section 1 exempts from the FAA only contracts of employment of transportation workers." The interstate truck drivers are clearly transportation workers, a fact not disputed by the Respondent, and therefore are exempt from the FAA. Requiring the team truck drivers to sign and adhere to the

[19] As the party asserting the FAA as an affirmative defense, the Respondent has the burden of proof to show that the agreements at issue are subject to the FAA. The assertion of the FAA as an affirmative defense requires me to address its reach in this decision. Though, as the Respondent notes, many courts have disagreed with the Board's rationale in *D. R. Horton*, et. al., the precise issue of whether a particular agreement to arbitrate is a "maritime transaction or a contract evidencing a transaction involving commerce" has not been squarely addressed.

MAA therefore violates the Act, regardless of the Board's decisions in *D. R. Horton* and related cases.

B. Enforcement of the MAA

Complaint paragraphs 4(e) and 5 allege that the Respondent violated Section 8(a)(1) of the Act by enforcing the MAA, as detailed above.

It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights. See, e.g., *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 16-17 (1962); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945).

Here, it is undisputed that the Respondent enforced the MAA by filing motions to compel individual arbitration in *Fardig* and *Ortiz*, as detailed above. (Jt. Exhs. Y, Z). The Respondent contends that the Board lacks authority to enjoin the Respondent's motions to compel because they are protected by the First Amendment under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983), and *BE&K Construction CO. v. NLRB*, 536 U.S. 516 (2002). I find that instant case falls within the exception set forth in Bill Johnson's at footnote 5, which states in relevant part:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, see *Granite State Joint Board, Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), rev'd, 409 U.S. 213, 93 S.Ct. 385, 34 L.Ed.2d 422 (1972); *Booster Lodge No. 405*, *Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), enforced in relevant part, 148 U.S.App.D.C. 119, 459 F.2d 1143 (1972), aff'd, 412 U.S. 84, 93 S.Ct. 1961, 36 L.Ed.2d 764 (1973), and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field." *NLRB v. Nash-Finch Co*., 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).

The Board has determined that these exceptions apply in the wake of *Bill Johnson's* and *BE&K Construction*. See, e.g., *Allied Trades Council (Duane Reade Inc.)*, 342 NLRB 1010, 1013, fn. 4 (2004); *Teamsters, Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991). Moreover, particular litigation tactics may fall within the exception even if the entire lawsuit may not be enjoined. *Wright Electric, Inc*., 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); *Dilling Mechanical Contractors*, 357 NLRB No. 56 (2011). As such, since the Board has concluded that agreements such as those comprising the MAA explicitly restrict Section 7 activity, the Respondent's attempt to enforce the MAA in state court by moving to compel arbitration fall within the unlawful objective exception in *Bill Johnson's*. See *Neiman Marcus Group*, supra.

The Respondent argues that numerous courts have found agreements such as the MAA to be lawful and enforceable. While this is true, the Board has held that agreements such as the MAA violate the Act, and the Supreme Court has not ruled otherwise. The Respondent, by its actions in court, is challenging Board case law which very clearly holds the MAA violates the Act. The motion to compel arbitration, which by virtue of the MAA can only be on an individual basis, is the crux of the challenge. Inherent in this challenge are risks, which the Respondent is assuming by declining to follow the Board's case law as it works its way through the system.

C. The MAA and Board Charges

Complaint paragraphs 4(b) and 5 allege that the Respondent violated Section 8(a)(1) by maintaining, at all material times since at least April 28, 2014, which would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board.

The *Lutheran Heritage* test set forth above applies to this allegation. I find that employees would reasonably construe the MAA as restricting their access to file charges with the Board.

The MAA is worded very broadly, and explicitly states it applies to "any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as "Dispute") that Employee may have" at any time that that "in any way arises out of, involves, or relates to Employee's employment" with the Respondent. This would certainly encompass an unfair labor practice charge with the Board.

More specifically, the MAA includes disputes involving:

> wrongful termination, wages, compensation, work hours, . . . sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, and all Disputes involving interference and/or retaliation relating to workers' compensation, family or medical leave, health and safety, harassment, discrimination, and/or the opposition of harassment or discrimination, and/or any other employment-related Dispute.

Certainly, disputes about wrongful termination, wages, compensation, and hours could comprise unfair labor practice claims. Discrimination based on Section 7 activity also is encompassed by this language.

The MAA then proceeds to state it applies to disputes under various federal laws, ending with a catchall that it applies to disputes under :

> all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws, or public policies that regulate, govern, cover, or relate to equal employment, wrongful termination, wages, compensation, work hours, invasion of privacy, false imprisonment, assault, battery, malicious prosecution, defamation, negligence, personal injury, pain and suffering, emotional distress, loss of consortium, breach of fiduciary duty, sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, or interference and/or retaliation involving workers'

> compensation, family or medical leave, health and safety, harassment, discrimination, or the opposition of harassment or discrimination, and any other employment-related Dispute in tort or contract.

That this would encompass some claims under the NLRA requires no explanation. The only claims explicitly excluded are benefits under unemployment compensation laws or workers' compensation laws.

The Respondent contends that the MAA would not be interpreted to apply to Board charges because of the following language:

> By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state or municipal law (including the right to file claims with federal, state or municipal government agencies).

The Respondent contends that because of the explicit statement that claims with federal, state, or municipal agencies are excluded from the MAA, any misinterpretation of the MAA would be manifestly unreasonable. I disagree.

To begin with, the MAA specifically states claims of sexual harassment, harassment and/or discrimination based on any class protected by federal law are subject to mandatory individual arbitration. These are all patently clear examples of claims that arise under the civil rights statutes the Equal Employment Opportunity Commission (EEOC) enforces, i.e., Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.[20] Yet the MAA also states that nothing would preclude an employee from filing a charge with a federal agency, ostensibly including the EEOC.[21] The only way to reconcile these two provisions is to read the MAA as not precluding filing a charge with an administrative agency, yet in the end those disputes must be resolved only through final and binding arbitration under the MAA rather than through whatever fruits filing a charge or other similar effort may bear. The same rationale holds true for Board proceedings, given that the MAA requires individual arbitration of disputes over "wrongful termination, wages, compensation, work hours." This begs the question: Why would any employee bother to file a charge? A reasonable employee, not versed in how various federal, state, and local agencies process claims, would take it at face value that the topics specifically included as falling within the MAA would be subject to arbitration. This is particularly true given that the MAA explicitly excludes benefits under unemployment compensation laws or workers' compensation laws, but not under the NLRA.

Considering that ambiguities must be construed against the drafter of the MAA, which is the Respondent, I find the MAA violates Section 8(a)(1) because employees would reasonably believe the MAA requires arbitration of employment-related claims covered by the Act. See *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).

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[20] These statutes are respectively codified at 42 U.S.C. 2000e et seq.; 42 U.S.C. 121-1 et seq; and 20 U.S.C. 633a.

[21] The EEOC's charge-filing process is described at http://eeoc.gov/employees/howtofile.cfm.

IV. Conclusions of Law

(1) The Respondent, Hobby Lobby Stores, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement (MAA) requiring all employment-related disputes to be submitted to individual binding arbitration.

(3) The Respondent violated Section 8(a)(1) of the Act when it enforced the MAA by asserting the MAA in litigation the Charging Party brought against the Respondent.

(4) The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the MAA is unlawful, the recommended order requires that the Respondent revise or rescind it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board. The Respondent shall notify all current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement. Because the Respondent utilized the MAA on a corporatewide basis, the Respondent shall post a notice at all locations where the MAA, or any portion of it requiring all employment-related disputes to be submitted to individual binding arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D. R. Horton,* supra, slip op. at 17; *Murphy Oil*, supra.

I recommend the Respondent be required to notify the U.S. District Court for the Eastern District of California in *Ortiz v. Hobby Lobby Stores, Inc.,* 2:13-cv-01619-TLN-DAD (E.D. Cal.), and the U.S. District Court for the Central District of *California in Fardig v. Hobby Lobby Stores, Inc*., 8:14-cv-00561-JVSAN (C.D. Cal.), that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to dismiss these actions and to compel individual arbitration of the claims, and inform the court that it no longer opposes the actions on the basis of the arbitration agreement.

I recommend the Company be required to reimburse employees for any litigation and related expenses, with interest, to date and in the future, directly related to the Company's filing its motion to compel arbitrations in *Ortiz v. Hobby Lobby Stores, Inc*., 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores*, Inc., 8:14-cv-00561-JVSAN (C.D. Cal.).

Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987), (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to the employees shall be computed on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Hobby Lobby Stores, Inc., Oklahoma City, Oklahoma, with a place of business in Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the U.S. District Court for the Eastern District of California in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.), and the U.S. District Court for the Central District of California in *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.), that it has rescinded or revised the mandatory arbitration agreement upon which it based its motions to dismiss the class and collective actions and to compel individual arbitration

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

of the employees' claim, and inform the respective courts that it no longer opposes the actions on the basis of the arbitration agreement.

(d) In the manner set forth in this decision, reimburse the plaintiffs who filed suit in *Ortiz v. Hobby Lobby Stores, Inc*., 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc*., 8:14-cv-00561-JVSAN (C.D. Cal.), for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing the Respondent's motion to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at all facilities in California the attached notice marked "Appendix A," and at all other facilities employing covered employees, copies of the attached notice marked "Appendix B."[23] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 8, 2015

Eleanor Laws
Administrative Law Judge

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, we will provide them a copy of the revised agreement.

WE WILL notify the courts in which the employees filed their claims in *Ortiz v. Hobby Lobby Stores, Inc*., 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc*., 8:14-cv-00561-JVSAN (C.D. Cal.), that we have rescinded or revised the mandatory arbitration agreement upon which we based our motion to dismiss her collective wage claim and compel individual arbitration, and we will inform the court that we no longer oppose the employees' claims on the basis of that agreement.

WE WILL reimburse the plaintiffs in *Ortiz v. Hobby Lobby Stores, Inc*., 2:13-cv-01619-TLN-DAD (E.D. Cal.), and *Fardig v. Hobby Lobby Stores, Inc*., 8:14-cv-00561-JVSAN (C.D. Cal.),

for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to dismiss her collective wage claim and compel individual arbitration.

HOBBY LOBBY STORES, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
901 Market Street, Suite 400, San Francisco, CA 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5183.

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, we will provide them a copy of the revised agreement.

HOBBY LOBBY STORES, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 20-CA-139745

Hobby Lobby Stores, Inc.,

Respondent,

and

The Committee to Preserve the Religious Right to Organize,

Charging Party.

RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND ITS REQUEST FOR ORAL ARGUMENT

Respondent Hobby Lobby Stores, Inc. ("Hobby Lobby," the "Company," or "Respondent"), pursuant to Rule 102.46 of the National Labor Relations Board's ("NLRB" or "Board") rules, files the following Exceptions to the decision of Administrative Law Judge ("ALJ") Eleanor Laws, dated September 8, 2015.[1]

1. Respondent excepts to the ALJ's failure to defer to the federal district courts' finding that Respondent's Mutual Arbitration Agreement (the "MAA") is enforceable under the National Labor Relations Act ("Act" or "NLRA"). The ALJ and the Board are collaterally estopped from re-deciding issues decided by the district courts, including that the MAA is subject to the Federal Arbitration Act ("FAA"), lawful, and enforceable. (ALJD p. 6, line 28 – p. 7, line 5 and *passim*.)

[1] The Administrative Law Judge's decision is cited as "ALJD" followed by the appropriate page and line numbers.

2. Respondent excepts to the ALJ's failure to defer to the federal district courts' findings that the Board's decision and reasoning in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), conflicts with the Federal Arbitration Act and the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). (ALJD p. 6, line 40 – p. 7, line 5 and *passim*.)

3. Respondent excepts to the ALJ's application of the Board's decisions in *D.R. Horton* and *Murphy Oil USA, Inc.* 361 NLRB No. 72 (2014), enf. denied in relevant part, --- F.3d ----, 2015 WL 6457613 (5th Cir. Oct. 26, 2015), which were both wrongly decided. (ALJD p. 7, line 25 – p. 9, line 44 and *passim*.) The Board's decisions in *Murphy Oil* and *D.R. Horton* are beyond the Board's authority, inconsistent with the Act, contrary to the Federal Arbitration Act, contrary to precedent of the U.S. Supreme Court, the U.S. Courts of Appeals, and other federal and state courts, and otherwise unlawful, and those decisions should be overruled.

4. Respondent excepts to the ALJ's finding that a class action waiver abridges employees' purported "right to seek class certification" to a greater extent than an employer's other procedural actions to oppose an employee's motion for class certification, collective certification, or other request for joinder. (ALJD p. 8, lines 22-29.)

5. Respondent excepts to the ALJ's finding that Respondent's arbitration agreements do not involve commerce within the meaning of the Federal Arbitration Act. (ALJD p. 10, line 21 – p. 15, line 32.)

6. Respondent excepts to the ALJ's finding that Respondent's team truck drivers are exempt from the Federal Arbitration Act. (ALJD p. 15, lines 36-41.)

7. Respondent excepts to the ALJ's finding that Respondent has violated the Act by requiring its team truck drivers to sign and adhere to the MAA. (ALJD p. 15, line 36 – p. 16, line 2.)

8. Respondent excepts to the ALJ's finding that Respondent has violated the Act by filing a motion to compel individual arbitration in *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.). (ALJD p. 16, line 6 – p.17, line 7.)

9. Respondent excepts to the ALJ's finding that Respondent has violated the Act by filing a motion to compel individual arbitration in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.). (ALJD p. 16, line 6 – p.17, line 7.)

10. Respondent excepts to the ALJ's finding that the MAA violates Section 8(a)(1) of the Act because employees would reasonably believe the MAA requires arbitration of employment-related claims covered by the Act. (ALJD p. 17, line 11 – p. 18, line 42.)

11. Respondent excepts to the ALJ's finding that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement (*i.e.*, the MAA) requiring all employment-related disputes be submitted to individual binding arbitration. (ALJD p. 19, lines 6-8.)

12. Respondent excepts to the ALJ's finding that Respondent violated Section 8(a)(1) of the Act when it enforced the MAA by asserting the MAA in litigation the Charging Party brought against the Respondent. (ALJD p. 19, lines 10-11.) This finding is clearly erroneous. No evidence was introduced to show that the Charging Party (a "committee") comprises any employees or applicants for employment with Respondent, nor is there any evidence that the Charging Party has ever filed suit against Respondent, much less that Respondent has ever tried to "assert the MAA" against the Charging Party in such litigation.

13. Respondent excepts to the ALJ's finding that Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board. (ALJD p. 19, lines 13-15.)

14. Respondent excepts to the ALJ's implicit finding that plaintiffs' conduct in filing their lawsuits in *Ortiz* and *Fardig* constituted protected, concerted activity within the meaning of Section 7 of the Act. (ALJD p. 16, line 6 – p.17, line 7.)

15. Respondent excepts to the ALJ's implicit finding that Respondent's motions to the federal courts sought to restrict any protected, concerted activity and therefore violated Section 8(a)(1) of the Act. (ALJD p. 16, line 6 – p.17, line 7.)

16. Respondent excepts to the ALJ's conclusions of law as erroneous and unsupported in fact and law. (ALJD p. 19, lines 3-15.)

17. Respondent excepts to the ALJ's remedy and order in their entirety. (ALJD p. 19, line 18 – p. 21, line 27.)

18. Respondent excepts to the ALJ's conclusions, remedy, and order because they contravene the Federal Arbitration Act and cannot be enforced by this proceeding. (ALJD p. 19, line 3 – p. 21, line 27.)

19. Respondent excepts to the ALJ's interpretation, application, and extension of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). (ALJD p. 7, line 25 – p. 8, line 12; p. 17, line 11 – p. 18, line 42.)

20. Respondent excepts to the ALJ's failure to rule on all material issues of fact, law, or discretion presented on the record as required by Rule 102.45. (*See* Respondent's Post-Hearing Brief.)

REQUEST FOR ORAL ARGUMENT

As discussed fully in Respondent's Brief in Support of Exceptions to ALJ's Decision, this case presents significant questions of law that arise frequently in cases before the Board. The central issues in this case include:

1. the continuing validity of the Board's decisions in *D.R. Horton* and *Murphy Oil*; and
2. the Board's authority to restrict a party from filing (and/or to sanction a party for having filed) a good-faith, successful motion to compel individual arbitration based on U.S. Supreme Court and U.S. Court of Appeals authority that demonstrates the party's motion does not have an objective that is illegal under federal law.

Because of the significance of the issues presented in this case and the need for employers and professional employer organizations to have clear guidance on these matters, Respondent respectfully submits that oral argument is appropriate and will assist the Board's decision in this case.

WHEREFORE, for the reasons stated above and in Respondent's brief in support filed contemporaneously, Respondent requests that the Board grant its request for oral argument, reverse the ALJ's decision, and dismiss the complaint in its entirety.